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Supreme Court of the United States

October Term, 1978

No. 78-269

MILGO ELECTRONIC CORPORATION and INTERNATIONAL COMMUNICATIONS CORPORATION,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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MILGO ELECTRONIC CORPORATION and INTERNATIONAL COMMUNICATIONS CORPORATION,

Petitioners,

vs.

WESTERN ELECTRIC COMPANY, INC. and AMERICAN TELEPHONE & TELEGRAPH COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioners, Milgo Electronic Corporation and International Communications Corporation (hereinafter "Milgo"), pray that a Writ of Certiorari issue to review the opinions and decisions of the United States Court of Appeals for the Fifth Circuit rendered on March 6, 1978, and May 19, 1978, respectively, and to remand the case to the Court of Appeals for determination of Milgo's appeal. Alternatively, petitioners pray that a Writ of Certiorari issue to review the Order of September 18, 1976, of the United States District Court for the Southern District of Florida, and to determine whether the District Court improperly withheld jurisdiction over Milgo's antitrust counterclaims.

OPINIONS BELOW.

The opinion of May 19, 1978, of the Court of Appeals, on petition for rehearing is reported at 573 F.2d 255 (5th Cir. 1978), and is set forth in Appendix A. The opinion of March 6, 1978, of the Court of Appeals, is reported at 568 F.2d 1203 (5th Cir. 1978), and is set forth in Appendix B. The Order of February 3, 1977, of the Court of Appeals denying Western Electric Company's (hereinafter "Western") motion to dismiss the appeal, presently unreported, appears in Appendix C. The Order of September 18, 1976, of the United States District Court for the Southern District of Florida, presently unreported, is set forth in Appendix D. The Court of Appeals, in its decisions, dismissed Milgo's appeal of the District Court's order striking certain antitrust counterclaims on the ground that it lacked jurisdiction over the challenged conduct. As a result of the decisions of the Court of Appeals, Milgo will be forced to try equitable issues which have facts in common with the dismissed antitrust counterclaims before it will have the right to try the legal antitrust counterclaims before a jury.

JURISDICTION.

The first Order of the Court of Appeals for the Fifth Circuit was entered on March 6, 1978, and the second Order denying a timely filed petition for a rehearing was entered on May 19, 1978. This Petition for Writ of Certiorari was filed within 90 days from the entry of the last Order as required by §2101 of Title 28 of the United States Code. The jurisdiction of this Court is invoked under §1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. Whether the Court of Appeals improperly dismissed Milgo's appeal, where such dismissal effectively forecloses Milgo's right to a jury trial, and where Milgo's loss of its right to a jury trial is irreparable and cannot be adequately remedied on appeal after a trial on the merits.

2. Whether the District Court improperly found Western to be immune from the antitrust laws, where there is no repugnancy between the regulatory provisions of the Communications Act and the antitrust laws, and where the pertinent standards set by the Communications Act and the antitrust laws are in harmony.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Constitutional provision at the heart of this Petition is the Seventh Amendment which states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

The Statues involved include the Sherman Antitrust Act, 15 U.S.C. §1 *et seq.*, and the Clayton Act, 15 U.S.C. §12 *et seq.* (both Acts referred to herein as the "antitrust laws"); and the Communications Act of 1934, 47 U.S.C. §201 *et seq.*

STATEMENT OF THE CASE.

A. The Pertinent Pleadings.

Western sued Milgo for patent infringement in the United States District Court for the Southern District of Florida, case No. 74-1601-Civ-CA. As an affirmative defense to the patent suit Milgo alleged that Western and its affiliated companies had violated the Bell consent decree[1] and misused the patents in suit by (1) charging a discriminatory royalty rate, and (2) tying in a data access arrangement (DAA) with a license under the patents in suit to all licensees who desired to use the patented apparatus (data modems) made by a source other than Western.

Milgo has alleged in counterclaims against Western and in a complaint against the third party defendant American Telephone & Telegraph Company (hereinafter "AT&T"), that AT&T, Western and the Bell System Operating Companies had conspired to restrain trade in the telephone customer data modem market after this market was opened to competition by an order of the Federal Communications Commission (hereinafter "FCC").[2]

According to Milgo's allegations, AT&T and Western, acting in concert with the Operating Companies, (1) caused the Operating Companies to purchase all of their requirements of data modems from Western, and (2) filed a discriminatory DAA-tariff without the approval of the FCC, and (3) used the tariff to foreclose the data modem market to Western's competitors. The discriminatory DAA-tariff required that only those telephone company customers who chose to obtain data modems from a general trade supplier (such as Milgo), in lieu of an Operating Company, were saddled with an expensive and troublesome DAA interface device for connecting their modems to the AT&T switched telephone network. The District Court struck these counterclaims on the ground that the conspiracy was immune from the antitrust laws.

[1] *United States v. Western Elec. Co., et al.*, 1956 Trade Cases ¶68,246 (D.C. N.J. 1956).

[2] *Carterfone*, 13 FCC2d 420 (1968), recon. den. 14 FCC2d 571 (1968).

B. Brief History of the Challenged Conduct.

The patents in suit are directed to terminal equipment commonly called data modems. Generally, such modems function as an interface between computers, or other sources of digital information, and the telephone network. For example, a modem can be arranged to accept digital data signals (ones and zeros) from a computer and translate these signals into a signal format (continuously varying analog signal) which can be transmitted over a voice-grade telephone line. Another modem at the other end of the telephone line is arranged to receive the transmitted signal format and translate it back into the original digital data signals for use by another computer or a terminal device such as a video display unit.

Western is but one component of the massive vertically integrated Bell System structure which includes AT&T, Western, Bell Telephone Laboratories (hereinafter "Bell Labs"), and the 23 Operating Companies which are regionally distributed throughout the United States. AT&T is the parent and controlling corporation; Western is the manufacturing arm (and wholly owned by AT&T); Bell Labs is the research and development arm (the subject matter of the patents in suit was

developed at Bell Labs); and the 23 Operating Companies provide telephone services and equipment directly to over 80% of this nation's telephone customers.

AT&T and the Operating Companies determine the services, equipment and respective prices to be offered to customers, and then file tariffs with the appropriate federal and state regulatory agencies. Regulatory agencies such as the FCC can either approve, disapprove or permit the tariff to go into effect without approval and subsequently hold hearings on whether the tariffs are in compliance with the regulatory act. The FCC has no power to suspend a tariff other than for a specific time period which is too short to allow detailed hearings.[3]

Milgo is a small company which entered into the data modem business in the mid-1960's. At that time the market available to an outside manufacturer such as Milgo was small indeed because of a Bell System tariff which absolutely forbade the connection of any non-Bell equipment to the AT&T switched telephone network. That prejudicial practice of absolute non-interconnection was drastically changed by the FCC in 1968.[4]

In 1968, the FCC in *Carterfone* found that the challenged sections of the non-interconnection tariff were, and had been since inception, unreasonably discriminatory and therefore unlawful under §§201(b) and 202(a) of the Communications Act of 1934, Title 47 U.S.C. After *Carterfone*, the FCC ruled that customers could obtain their equipment such as data modems for connection to the switched telephone net-

[3]*See, In re AT&T "Foreign Attachment" Tariff Revisions,* 15 FCC2d 605 (1968), recon. den. 28 FCC2d 871 (1969).

[4]*Carterfone, supra.*

work from sources other than the Operating Companies. The FCC requested the common carriers, *i.e.*, AT&T, to file new tariffs which would carry out this mandate and placed the burden of proof on the carriers to establish, prior to the filing of a tariff, that any restrictive practices required by the carriers were in fact necessary and non-discriminatory.[5]

After the *Carterfone* decision, the Bell System made a business decision that, when a customer decided to obtain equipment such as a data modem from a source other than the Bell System, a DAA connecting arrangement provided by the telephone companies would be required to connect that modem to the switched network. When a customer obtained a modem from the Bell System, no DAA was to be required. This business decision was implemented by AT&T's Tariff 263, Sections 2.7.5, 2.7.6, 2.7.7 and 2.7.8.[6] Since as a practical matter, the Bell System only deals in Western modems, this policy was designed to prevent or severely hinder customers from obtaining modems from any source other than Western, thereby maintaining Western's monopoly in the telephone customer modem market.

Without approving the tariff, the FCC allowed it to go into effect pending FCC review as to its compliance with the law. The FCC did, however, warn AT&T that:

> "As a result of a series of conferences we have had with representatives of your company and representatives of other manufacturers and dis-

[5]First Report and Order (hereinafter "FRO"), 56 FCC2d 593 (1975), paragraph 10.

[6]FRO, *supra.*

tributors of customer-provided terminal devices, one issue has now crystallized to the point that substantial doubt exists as to whether the revised tariffs are reasonable, non-discriminatory and in compliance with the *Carterfone* decision . . .'"[7]

After establishing Docket 19528 and after several years of hearings, the FCC found that AT&T had not even attempted to meet its burden of proof that the tariff was non-discriminatory. As stated in the FRO:

". . . In the seven years which have elapsed since our *Carterfone* ruling, the carriers have been afforded ample opportunity to propose effective procedures and/or tariff conditions to prevent harm without unduly restricting a customer's basic right to make reasonable use of the facilities and services furnished by the carrier. This the carriers have failed to do . . ."[8]

The FCC concluded that Tariff 263 was unreasonably restrictive on a customer's right to make use of telephone lines [violative of 47 U.S.C. §201(b)], and that Tariff 263 constituted ". . . an unjust and unreasonable discrimination both among users . . . and among suppliers of terminal equipment . . ."[9] [violative of 47 U.S.C. §202(a)]. The unlawful carrier-initiated DAA provisions were stricken and a registration program was instituted by the FCC.[10] The FCC registration program applies to carrier-provided equip-

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[7]FCC letter to AT&T, dated December 16, 1971; attached as Appendix E.

[8]FRO, *supra*, paragraph 16.

[9]FRO, *supra*, paragraph 16.

[10]FRO, *supra*, paragraph 17 et seq.

ment (Western-made DAAs or modems) and non-carrier provided equipment (Milgo-made DAAs or modems) alike.

It is Western's and AT&T's anticompetitive conduct from 1968 through 1977 in (1) conspiring with the Bell Operating Companies to ensure that only Western's modems were handled by the Operating Companies, and (2) filing and using the discriminatory DAA tariff to coerce customers into obtaining their modems from the Operating Companies which forms the basis of one of Milgo's antitrust counterclaims and one of Milgo's equitable patent misuse defenses. Obviously, the misuse defense and the antitrust counterclaim have many factual issues in common, *i.e.*, was a DAA forced on only those modem users who elected to use modems manufactured from a source other than Western as a result of the AT&T initiated tariff in combination with the Bell System's purchasing policy.

C. Proceedings Below.

The District Court on September 18, 1976, by granting in part Western's motion for partial summary judgment, struck Milgo's counterclaims for violation of Sections 1 and 2 of the Sherman Act directed to the DAA anticompetitive conduct on the ground that the FCC had exclusive jurisdiction over such counterclaims. However, the court retained jurisdiction over Milgo's equitable defenses of patent misuse based on the DAA conduct. With respect to the dismissed DAA counterclaims, Milgo is entitled to a jury trial and made a timely request for a jury trial. The fact issues of Milgo's equitable DAA misuse defense are triable to the judge.

Milgo appealed the District Court's decision on the ground that the order was appealable under the collateral order doctrine or as an order refusing injunctive relief. In the alternative, Milgo requested the Court of Appeals issue a Writ of Mandamus to correct the manifest error of the District Court order in finding that Western was immune from the antitrust laws.

The Court of Appeals initially determined, by a first three-judge panel, that it had jurisdiction to hear the appeal on the dismissal of Milgo's counterclaims. After the issues on appeal were briefed and argued, the Court requested the parties to address the question of whether Milgo was still seeking an injunction with regard to the DAA conduct in view of the commencement of the registration program. Milgo responded that injunctive relief as to the specific DAA requirement would no longer be appropriate. Milgo, however, pointed out that the trial court had broad powers to award appropriate injunctive relief against a conspiracy after a trial on the merits. Milgo also indicated that it would seek appropriate injunctive relief against the conspiracy in light of the facts proven at the trial.

Subsequently, the Court of Appeals, through a second panel, dismissed the appeal on the grounds that the order was not appealable (1) under the collateral order doctrine because Milgo would suffer no irreparable injury if it had to wait until after trial to appeal the dismissal of the DAA tie-in antitrust counterclaims and then return to the District Court to try such claims, or (2) as an order refusing injunctive relief because the need for injunctive relief became moot during the pendency of the appeal. The Court of Appeals also refused to grant a writ of certiorari.

On petition for rehearing, Milgo strongly urged that the respective dismissals by the District Court and the Court of Appeals were tantamount to a denial of Milgo's right to a jury trial on the dismissed counterclaims. The Court of Appeals in its opinion denying the petition for rehearing indicated that there was a possibility that Milgo *might* get a jury trial.

Milgo urges that the *possibility* of preserving the right to a jury trial is not contemplated by the Constitution nor is it contemplated by the decisions of this Court.

REASONS FOR GRANTING THE WRIT.

I.

The Fifth Circuit's Dismissal of Milgo's Appeal Manifests a Clear Disregard for Milgo's Right to a Jury Trial.

A. Where Legal Claims and Equitable Claims in the Same Action Have Common Issues of Fact, the Right to a Jury Trial on the Legal Issues Must Be Jealously Guarded by the Courts.

The present posture of Milgo's right to a jury trial on the dismissed counterclaims is as follows. The misuse defense related to the DAA-tariff will be tried to the trial court, and the court will make the findings of fact with respect to the equitable misuse defense.[11] After the complete trial, Milgo can then appeal the dismissal of its antitrust counterclaims.

However, such an appeal could not adequately remedy Milgo's loss of a trial by jury if the Court of Appeals determines that the District Court had jurisdiction over Milgo's DAA-tariff related antitrust counterclaims. At that time, issues of fact common to the DAA-tariff related antitrust counterclaims will already have been tried by the District Court. Those determinations will be conclusively binding on any subsequent trial of Milgo's DAA-tariff related antitrust counterclaims through the doctrines of collateral estoppel and res judicata.

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[11]As discussed below, Milgo has no right to a jury trial on the misuse issue. The only way in which Milgo could get a jury trial on the misuse issue is through the remote possibility that Western and AT&T would consent to a jury trial on the misuse issue and that the trial court would order a jury trial based on such consent.

Therefore, the Orders of the District Court and the Court of Appeals effectively require that Milgo's DAA equitable claims are to be tried prior to Milgo's DAA legal claims, despite the fact that there are factual issues common to both claims. The curtailment of a right to jury trial, by a trial sequence which required that equitable claims be tried first, is the very situation which this Court has found to be impermissible.

This Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), is clearly on point and provides the basis upon which this case can be decided. In *Beacon Theatres*, this Court relied upon the following language from *Dimick v. Schiedt*, 293 U.S. 474 (1935), for granting certiorari:

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that *any seeming curtailment* of the right to a jury trial should be scrutinized with the utmost care." 293 U.S. 474, at 486. (Emphasis added)

Such mandated close scrutiny was clearly not exercised by the Court of Appeals.

The *Beacon Theatres* case involved an order by the District Court which called for a trial wherein equitable claims were to be tried prior to legal claims although there were common issues of fact. This was found to be impermissible by this Court. Where legal claims and equitable claims in the same action involve common issues of fact, the paramount importance of first trying legal claims before a jury prior to the determination of equitable claims was set forth by this Court:

> ". . . only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres, Inc. v. Westover, supra,* at 510-511 (Footnote 19 omitted).

In *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962), this Court reaffirmed and reemphasized the importance of preserving a litigant's right to a jury trial:

> "That holding [in Beacon Theatres], of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances', Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." 369 U.S. 469, at 473 (Footnotes 7 and 8 omitted).

Similarly, there are no "imperative circumstances" in this case which justify denying Milgo's right to a jury trial on its DAA-tariff related antitrust counterclaims. It is imperative that Milgo's right to a jury trial be protected.

In both the *Beacon Theatres* and *Dairy Queen* cases, this Court held that the Court of Appeals erred in refusing to grant a writ of mandamus to compel a jury trial which had been improperly denied by the District Court. As stated by this Court in *Beacon Theatres:*

> "Respondent claims mandamus is not available under the All Writs Act, 28 U.S.C. §1651. What-

> ever differences of opinion there may be in other types of cases, we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." 359 U.S. 500, 511 (Footnote 20 omitted).

Similarly, this Court in *Dairy Queen* stated that mandamus was appropriate to correct the error of a district court which refused a demand for a jury trial:

> "The Court of Appeals should have corrected the error of the district judge by granting the petition for mandamus." 369 U.S. 469, 480.

The case at bar is different from the *Beacon Theatres* and *Dairy Queen* cases only because of the contingency of a reversal of the District Court's immunity ruling. This difference does not change the mandate set out in these cases, that Milgo should not be deprived of a jury trial by a delay of an appellate review of the immunity ruling until after the other issues are tried.

B. The Court of Appeals Opinion on Milgo's Petition for Rehearing Begs the Question of Whether Milgo Has Been Foreclosed From a Jury Trial.

In its opinion of May 19, 1978, the Court of Appeals mischaracterizes Milgo's contention of loss of a jury trial as "conjectural". Such characterization is unfounded and, indeed, unsubstantiated by the Circuit Court's analysis of Milgo's predicament. Milgo's threatened loss is more than "conjectural", it is very imminent.

If anything in this matter might be characterized as "conjectural", it is the analysis by the Court of Appeals of how Milgo's right to a jury trial *might* be preserved. For example, the Court of Appeals stated:

"It *may* be that in the pending proceeding the district court will order a jury trial as a matter of right on such issues as may embrace the 'DAA facts' or it *may* order a jury trial with the consent of both parties." (Emphasis added).

Thus, the Court of Appeals alludes to the *possibility* that the DAA-tariff related facts are triable by a jury as a matter of right, and the *possibility* that Western would consent to a common law jury trial of the DAA-tariff related facts as provided for by Rule 39(c) of the Federal Rules of Civil Procedure.

In a similar vein, the Court of Appeals indulges in further speculation as to how Milgo's equitable defense might be triable as a matter of right since it is asserted as a defense to legal claims. In footnote 1, the Court stated:

"We note that Western Electric has prayed for an accounting for damages. Such a prayer ordinarily gives rise to a right to trial by jury, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-80, 82 S.Ct. 894, 899-901, 8 L.Ed.2d 44, 51-52 (1962), which *perhaps* extends to the issue of patent misuse." (Emphasis added).

However, Milgo's threatened loss of a Constitutional right is not as mitigated as the Court of Appeals would have us believe. It should be pointed out that the Court of Appeals failed to cite any authority for its contention that Milgo might be entitled to a jury trial on the misuse issue as a matter of right. Moreover, the Court of Appeals failed to cite any authority for its apparent proposition that the trial judge had discretion to order a jury trial on Milgo's misuse issue

without the consent of Western and AT&T. It should also be pointed out that the *Dairy Queen* case makes no suggestion of extending the right to a jury trial to the equitable misuse defense which is asserted as a defense to a legal claim. *Dairy Queen* states that a legal claim cannot be taken from the province of a jury by assertions of an equitable defense to such a legal claim. *Dairy Queen* does not in any manner suggest that an equitable defense to a legal claim must necessarily be tried by a jury.

An equitable defense to a legal claim does not make the equitable defense triable by right to a jury, and the defense of patent misuse is equitable in nature.

It has been well established by this Court that patent misuse is an application of the equitable maxim of "unclean hands." In *Morton Salt Company v. Suppiger*, 314 U.S. 488 (1942), this Court stated with respect to a patent grant:

". . . the use of it [the patent] to suppress competition in the sale of an unpatented article may deprive the patentee of the aid of a court of equity to restrain an alleged infringement by one who is a competitor." 314 U.S. 488, 491.

This Court further stated:

"Equity may rightly withhold its assistance from such a use of the patent by declining to entertain a suit for infringement, and should do so at least until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated." 314 U.S. 488, 493.

Thus, it should be clear that misuse is a defense to the equitable aspects of a patentee's claims for relief.

Further, it is well established that the doctrine of "unclean hands" is equitable in nature; and indeed, its application is within the discretion of the trial judge. In *Inland Steel Products Co. v. MPH Manufacturing Corp.*, 25 F.R.D. 238 (1959), the court, in holding that issues of patent validity and infringement were triable to a jury and that issues of patent misuse were triable only to the court, stated:

> "The defense of patent misuse has consistently been treated as an equitable defense; it is a branch of the doctrine of 'unclean hands.' See, e.g., *Morton Salt Co. v. G.S. Suppiger Co.*, 1942, 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363; *Gray Tool Co. v. Humble Oil & Refining Co.*, 5 Cir., 1951; 186 F.2d 365; *Mercoid Corporation v. Minneapolis-Honeywell Regulator Co.*, 7 Cir., 1942, 133 F.2d 811. Therefore, the misuse claims are not triable of right by jury." 25 F.R.D. 238, 247.

Moreover, if as suggested by the Court of Appeals that an equitable defense to a legal claim extends the right to a jury trial to the equitable defense, then the decisions of this Court in *Beacon Theatres* and *Dairy Queen* would have been unnecessary. The injury remedied in those cases was the denial of a right to a jury trial on legal issues which had facts in common with equitable claims which were to be tried first. If the equitable claims, by virtue of being related to legal claims, had been triable by right to a jury, then the order of trial would have been immaterial. However, since no such right to a jury determination attaches to equitable claims which are related to legal claims, this Court held that the order in which

equitable and legal issues are tried is of critical importance.

The suggestion by the Court of Appeals that the trial judge might have the discretion to order a jury trial without the consent of Western and AT&T is similarly untenable. Indeed, such a suggestion flies in the face of the words of Rule 39(c) of the Federal Rules of Civil Procedure which states in pertinent part:

> "In all actions *not triable of right by a jury*, the court . . . with the *consent of both parties*, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right." (Emphasis added).

Thus, since an equitable matter is clearly not triable by right to a jury, it is clear that any discretion the trial judge in this case might have with respect to ordering a jury trial on the misuse issue can be exercised *only* after both Western and AT&T consent to a jury trial on the misuse issue.

However, the suggestion by the Court of Appeals that Western might consent to a jury trial comes close to straw-grasping. It certainly would be unreasonable, if not reckless, to rely upon an opponent in a litigation to protect one's Constitutional rights. It certainly would not be in Western's best interests to consent to something which might be favorable to Milgo.

There are further problems with the suggestion by the Court of Appeals that Western might consent to a jury trial on the DAA misuse defense. Since facts involving the DAA misuse defense are common to the DAA antitrust counterclaims, any jury findings on such facts would be binding on AT&T in a subsequent trial on the antitrust claims, particularly since

AT&T is a party to this litigation. Therefore, AT&T's consent to a jury trial on the DAA misuse defense would be required in addition to Western's consent.

Thus, the threat to Milgo's Constitutional right is not as "conjectural" as the Court of Appeals would have us believe. Distilled to its essence, the opinion of the Court of Appeals indicates that Milgo's right to a jury trial is not irreparably threatened because there is an extremely remote possibility that both Western and AT&T will consent to a jury trial on the DAA facts, even if such consent would not be in the best interests of Western and AT&T.[12]

Such remote possibilities cannot be considered as sufficient safeguards to Constitutional rights. This Court in *Beacon Theatres v. Westover, supra,* did not even consider the possibility that the parties could consent to a jury trial on the equitable issues, even though such possibility may have existed, and even though a portion of the case before the District Court was to be tried to a jury. Similarly, this Court in *Dairy Queen v. Wood, supra,* did not consider the possibility of consent by the parties to a jury trial on equitable issues.

Although not discussed by the Court of Appeals, Milgo urges that an advisory jury impanelled to assist the trial judge in deciding equitable issues would not

[12]Western and AT&T are not likely to consent to a jury trial, in which event Milgo would probably have no means of appealing the loss of a jury trial to the Court of Appeals. Even if a jury trial on the misuse issue could be had, the procedural complexity of first trying the misuse issue, appealing the dismissal of Milgo's antitrust counterclaims, and subsequently trying the antitrust counterclaims in view of the prior findings on the misuse issue would be burdensome and wasteful for the litigants and the courts.

preserve Milgo's right to a jury trial. Rule 39(c) provides the basis for impanelling an advisory jury:

> "In all actions not triable of right by a jury, the court upon motion or of its own initiative may try any issue with an advisory jury . . ."

The rule itself makes clear that such an advisory jury does not fulfill the requirements of a traditional jury trial.[13]

As discussed above, consent of all parties to a jury trial is necessary in actions where there is no right to a jury trial. Only where such consent is present can the jury verdict have "the same effect as if trial by jury had been a matter of right." Rule 39(c), Federal Rules of Civil Procedure.

Thus, it is clear that impanelling an advisory jury for issues in an equitable matter is not the same as a jury trial on such equitable matter. If an advisory jury fulfills the right to a jury trial, and if a trial judge has discretion to order a jury trial on an equitable matter, then Rule 39(c) would be meaningless and superfluous.

C. Milgo Has Been Irreparably Harmed by the District Court's Dismissal of Milgo's DAA Antitrust Counterclaims and the Dismissal of Milgo's Appeal by the Court of Appeals.

Milgo therefore urges that, in view of the foregoing analysis of the present posture of this case, it has

[13]This is particularly true in view of the trial judge's discretion in submitting issues to an advisory jury. *Sheila's Shine Products, Inc. v. Sheila Shine, Inc.,* 486 F.2d 114 (5th Cir. 1973). Also, even with an advisory jury, the trial court has the ultimate responsibility of being the trier of fact in equitable matters, *Frostie Company v. Dr. Pepper Company,* 361 F.2d 124 (5th Cir. 1966), and the trial court's findings will be reviewed on appeal just as though no jury had been present. *Reed v. Riddle Airlines,* 266 F.2d 314 (5th Cir. 1959).

been irreparably harmed by the decisions below. Its Constitutional right to a jury trial has been effectively foreclosed, and appellate review after trial could not adequately remedy Milgo's loss of its Constitutional right.

The immediacy of Milgo's loss of a jury trial, coupled with the irreparable nature of such loss, calls for extraordinary relief which only the Court can provide. No other recourse is available to Milgo to protect its right to a jury trial.

II.

The District Court Erred in Finding That Western Is Immune From the Antitrust Laws.

In granting the Motion for partial summary judgment dismissing Milgo's antitrust counterclaims on the ground that it did not have jurisdiction, the District Court failed to abide by this Court's mandate that antitrust immunity is not to be lightly implied, and that implicit repeal of the antitrust laws by a regulatory statute is strongly disfavored. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). The reason for only grudgingly granting antitrust immunity was stated in that case:

> "This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here." 374 U.S. 321, 348.

Similarly, this Court in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), stated the national importance of the federal antitrust laws as follows:

> "We have long recognized that the antitrust laws represent a fundamental national economic policy

> and have therefore concluded that we cannot lightly assume that enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." 383 U.S. 213, 218.

The pertinent regulatory act here involved is the Communications Act of 1934, 47 U.S.C. §201 *et seq.* Any immunity for Western's DAA related activities must be implied, for Congress provided only a limited specific antitrust exemption for telephone companies with respect to certain consolidations which have been certified by the FCC. 47 U.S.C. §221(a). Such express provision for limited immunity gives credence to the inference that Congress did not intend any other activities to be immune, for if Congress did so intend, it would have set forth its intent along with the express immunity.

In the absence of express Congressional language exempting a regulatory scheme from the antitrust laws, implied repeal of the antitrust laws will be found only where there is "plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 351; *United States v. National Associates of Security Dealers, Inc.*, 422 U.S. 659, 682 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975). Moreover, the applicability of the antitrust laws will be repealed only to the minimum extent necessary to make the regulatory scheme work. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

Here, there is no repugnancy but, rather, harmony between the regulating provisions of the Communications Act and the antitrust laws. Applying the antitrust

laws to the challenged conduct would not subject Western and its co-conspirators to conflicting standards. The pertinent standard set out in the Communications Act forbids carriers from filing tariffs which provide for discriminatory or preferential treatment. 47 U.S.C. §202. The DAA-tariff 263 on its face provided for treatment which was preferential for the Operating Companies, and discriminatory with respect to the customers of the Operating Companies and to general trade suppliers (such as Milgo). The same standard of non-discrimination as mandated by the antitrust laws and the Communications Act, is applicable to the DAA conduct of Western and its co-conspirators. Indeed, the FCC found the tariff to be unlawful under the Communications Act for the same reason that Milgo alleges it to be unlawful under the Sherman Act; *i.e.*, the tariff is unreasonably discriminatory in favor of one supplier to the detriment of free competition in the telephone company customer equipment market.

The District Court, in striking the DAA counterclaims, failed to even make specific findings of repugnancy between the regulatory act and the antitrust laws, or of any grounds from which repugnancy could be reasonably concluded. Clearly, the importance of the antitrust laws dictates that some basis must be given for a finding of immunity. This is particularly true when consideration is given to the fact that neither Western nor the concerted action between the affiliated Bell System companies to maintain Western as the sole supplier of modems to the Operating Companies is subject to the regulatory scheme.

Further support for lack of immunity can be found with the FCC itself. In its amicus brief filed in *United States v. American Telephone & Telegraph Company*, CA-74-1698, District Court for the District of Columbia, the FCC states:

> "Carriers subject to FCC jurisdiction are required to file tariffs setting forth the rates, practices and regulations that govern their service offerings. 47 U.S.C. §203. These must be just and reasonable 47 U.S.C. §201, and they must not contain undue discriminations or preferences, 47 U.S.C. §202.
>
> * * *
>
> But rate filings generally proceed from the carrier's independent business judgment and the Communications Act does not require Commission approval either before or after the rates become effective without Commission scrutiny or approval.
>
> These carrier-initiated tariffs which have not been approved by the Commission do not in our opinion immunize the carrier against claims that the tariffs are anticompetitive. The courts have consistently exercised jurisdiction in antitrust cases attacking carrier practices and rates that purportedly were justified by tariffs on file with but not approved by the Commission. . ." (Pages 19 & 20)[14]

A further compelling reason for denying antitrust immunity to the DAA-tariff related activities is the finding of unlawfulness by the FCC of the DAA-

[14]The title page and pages 19 and 20 of the Amicus Brief are attached as Appendix F.

tariff. In *Carnation Company v. Pacific Westbound Conference, supra,* the statute involved there, the Shipping Act, included an express antitrust exception for rate-making activities which were *lawful* under the Shipping Act. This Court stated that the exemption "implies that unlawful rate-making activities are not exempt." 383 U.S. 213, 217. Similarly, in *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 306-307 (1973), this Court found that there need be no determination of antitrust immunity where particular acts have been found to be unlawful under the statute which is alleged to provide antitrust immunity.

It therefore follows that assertions of antitrust immunity under the Communications Act are meaningless where the very acts alleged to be immune have been found by the FCC to be in violation of the Communications Act.

This Court recently refused to grant certiorari to review a Ninth Circuit Court of Appeals holding directly in point to that requested by Milgo herein, namely that a common carrier is not immune from the antitrust laws because the challenged conduct was also subjected to regulatory proceedings. *Greyhound Corp. v. Mt. Hood Stages, Inc.,* .... U.S. ...., 57 L.Ed.2d 239, at 246, footnote 12 (1978).

In denying the carrier's claim of antitrust immunity, the Ninth Circuit Court of Appeals held:

> "Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency, as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy, as it did in this instance. . .
>
> * * *
>
> "Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied. *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 682 (1975). . ." *Mt. Hood Stages, Inc. v. Greyhound Corp.,* 555 F.2d 687, 691-692 (9th Cir., 1977) (Footnotes omitted).

The trial court's order striking the antitrust counterclaims is contrary to the decisions of this court. The order should be reversed.

CONCLUSION.

Milgo's loss of its right to a jury trial is imminent, and the loss cannot be adequately remedied by appeal after a trial on the merits. Review by certiorari is the only effective means of assuring that Milgo will not lose its right to a jury trial.

It is therefore urged that this Court review and remand this case to the Court of Appeals with an order that the Court of Appeals decide the merits of Milgo's appeal which was directed to the issue of whether Western was immune from the antitrust laws.

Alternatively, petitioners urge that this Court should decide whether the District Court improperly found that Western is immune from the antitrust laws, since immediate determination of this question is necessary to preserve Milgo's right to a jury trial, and since

the District Court's determination of exclusive FCC jurisdiction is contrary to the decisions of this Court and critically erodes the national economic policy defined by the antitrust laws.

Respectfully submitted,

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APPENDIX A.

WESTERN ELECTRIC COMPANY, INC., Plaintiff-Appellee, v. MILGO ELECTRONIC CORPORATION and International Communications Corporation, Defendants-Third-Party Plaintiffs-Appellants, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Third-Party Defendant. No. 76-4079. United States Court of Appeals, Fifth Circuit. May 19, 1978.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before THORNBERRY, GODBOLD and FAY, Circuit Judges.

PER CURIAM:

Milgo urges that it is entitled to review under the collateral order doctrine because it is irreparably injured by possible loss of its constitutional right to jury trial. The argument runs this way. It demanded a jury trial on its counterclaims. However, those of its counterclaims which were based on the DAA requirement were dismissed by the summary judgment from which it is attempting to appeal. The facts involved in the DAA counterclaims are also involved in Milgo's patent misuse defense, and the trial of the proceeding below will be without a jury (at least as to those facts).[1] If eventually it should be determined that

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[1]Milgo has not told us whether it has requested a jury trial on the issues to which patent misuse is a defense or whether the district court has issued an order regarding jury trial; all it has told us is that it has demanded a jury on its counterclaims.

(This footnote is continued on next page)

the court erred in dismissing the DAA counterclaims Milgo will then be permitted to go to trial on these counterclaims, but, Milgo asserts, under the doctrines of res judicata or collateral estoppel the factual issues determined without a jury in the proceeding now pending will be determinative of the same factual issues in the later trial. Hence, Milgo may be denied a jury trial as to these facts.

At this point Milgo's contention is conjectural. It may be that in the pending proceeding the district court will order a jury trial as a matter of right on such issues as may embrace the "DAA facts," or it may order a jury trial with the consent of both parties.

If in the present proceeding below Milgo does not receive a jury trial on the "DAA facts," and ultimately it is allowed to go to trial on its DAA counterclaims, Milgo will be able to require a new trial before a jury unless the denial was harmless error. *See U. S. v. Williams*, 441 F.2d 637 (CA5, 1971); Wright & Miller, Federal Practice and Procedure § 2322. Milgo thus will not be irreparably injured.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service

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We note that Western Electric has prayed for an accounting for damages. Such a prayer ordinarily gives rise to a right to trial by jury. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-80, 82 S.Ct. 894, 899-901, 8 L.Ed.2d 44, 51-52 (1962), which perhaps extends to the issue of patent misuse.

on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX B.

WESTERN ELECTRIC COMPANY, INC., Plaintiff-Appellee, v. MILGO ELECTRONIC CORPORATION and International Communications Corporation, Defendants, Third-Party Plaintiffs-Appellants, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, Third-Party Defendant. No. 76-4079. United States Court of Appeals, Fifth Circuit. March 6, 1978.

Before THORNBERRY, GODBOLD and FAY, Circuit Judges.

GODBOLD, Circuit Judge:

Defendant Milgo appeals from the district court's order of summary judgment against it as to some of its counterclaims. We conclude that we lack jurisdiction to hear an appeal from this order.

I. Facts

Both Milgo and Western Electric[1] manufacture terminal equipment known as data modems. "Modem" is an acronym for "modulation and demodulation."[2] Modems, when connected to telephone lines, allow computers to send and receive information to and from each other. Western sued Milgo for infringement of Western's modem patents. Milgo counterclaimed for damages and injunctive relief, alleging violations of

[1]Western Electric is the manufacturing arm of American Telephone & Telegraph Company (the Bell System).

[2]"Foreign Attachment" Tariff Revisions in A.T.&T. Tariff FCC Nos. 263, 260, and 259, 15 F.C.C.2d 605, 607 (1968).

the antitrust laws and acts of unfair competition.[3] Each claim alleged two separate but, to Milgo's view, interrelated discriminatory practices employed by the Bell System. First, Bell has required customers using modems not of Western's design to install and lease a connecting device known as a Data Access Arrangement (DAA). Customers who use Western-designed modems are excused from this requirement. Second, Bell has required that customers who use modems of Western's design but manufactured by another source through a patent license pay a 2% royalty.

The district court's summary judgment dismissed those parts of the counterclaims based upon the DAA requirement. Its decision stemmed from the FCC's recent establishment of a registration program, 47 C.F.R. pt. 68, whereby terminal equipment and interconnection devices could be registered and approved by the FCC, and if a modem not of Western's design were registered, the use of an interconnection device would not be required.[4] The district court based its order on the

[3]Milgo also alleged a violation by Western of the terms of a 1949 antitrust consent decree requiring it to grant patent licenses on its equipment. *U. S. v. Western Elec. Co.*, 1956 Trade Cases ¶68,246 (D.N.J. 1956). The district court dismissed this part of the unfair competition counterclaim on the theory that consent decree violations can be used only as defenses and not as causes of action. Milgo has not appealed from the summary judgment against this counterclaim.

[4]*See First Report and Order in Docket No. 19528*, 56 F.C.C.2d 598 (1975), *aff'd, North Carolina Util. Comm'n v. FCC (North Carolina II)*, 522 F.2d 1036 (CA4, 1977), *cert. denied*, ... U.S. ....., 98 S.Ct. 222, 54 L.Ed.2d 154 (1977). Although modems were not specifically included

(This footnote is continued on next page)

doctrine of implied repeal, *see, e.g., Gordon v. New York Stock Exchange,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1973), *U. S. v. National Association of Securities Dealers, Inc.,* 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975), finding in particular that the antitrust laws were impliedly repealed in this area because of pervasive regulation by the FCC.

II. Appealability

By a one-sentence order dated February 3, 1977, a panel of this court denied Western's motion to dismiss Milgo's appeal.[5] The panel in effect determined that an appeal could be maintained, but we are not bound by this determination. *EEOC v. International Longshoremen's Association,* 511 F.2d 273, 276 n. 5 (CA5), *cert. denied,* 423 U.S. 994, 96 S.Ct. 421, 46 L.Ed.2d 368 (1975).[6]

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within the scope of the registration program, the FCC later established that they were included. *Memorandum Opinion and Order in Docket No. 19528,* 57 F.C.C.2d 1216, 1219 (1976).

[5]Motions to dismiss and various other prehearing matters are assigned to screening panels of this court, each composed of three judges designated for one-year periods. A case in which a motion to dismiss is denied will later fall to a screening panel—not necessarily the same one—for consideration of whether it will be assigned to the summary calendar or the oral argument calendar. If not placed on the summary calendar the case will be assigned to an oral argument panel for hearing and decision. The present panel is the oral argument panel.

[6]Action on a motion to dismiss before a case is assigned to an oral argument panel disposes of those cases in which appellate jurisdiction is clearly lacking so that the court and the advocates do not expend their efforts in a consideration of the merits that later would prove to be fruitless. Matters of appellate jurisdiction are also subject to scrutiny by the

Milgo has raised two possible grounds for appealability: whether the partial summary judgment is a final decision under the collateral order doctrine, hence appealable under 28 U.S.C. § 1291, and whether it is an interlocutory order refusing an injunction, hence appealable under 28 U.S.C. § 1292(a)(1). We conclude that the district court's order is not a final decision. We need not decide whether the district court's order is an interlocutory order refusing an injunction because the prayer for injunctive relief, which the order refused, is now moot.

(A.) Collateral order doctrine

Section 1291 confers on the courts of appeals "jurisdiction of appeals from all final decisions of the district

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oral argument panel to whom the case falls. In *EEOC v. International Longshoremen's Association,* we said:

> "Indeed, it might appear that once a panel of this Court had made a legal determination that jurisdiction exists, no subsequent panel on its own could make a contrary determination. Rather the original panel's action would appear, at the least, the law of the case, and could not be overruled except by this Court sitting en banc. Nonetheless, this Court has held that the panel deciding the case must make a de novo determination of jurisdiction. We have said: 'Although motions to dismiss have been denied under our administrative procedures, the Court of Appeals is not precluded from a further inquiry as to its jurisdiction and is not relieved of the duty to dismiss the appeal if it appears there is no jurisdiction.' *Austracan, Inc. v. M/V Lemoncore,* 5 Cir. 1974, 500 F.2d 237 at 239; *see also Cook v. Eizenman,* 5 Cir. 1963, 312 F.2d 134 at 136. Thus we must make the independent inquiry above."

511 F.2d 273, 276 n. 5 (CA5), *cert. denied,* 423 U.S. 994, 96 S.Ct. 421, 46 L.Ed.2d 368 (1975). In other circuits, *see Melendez v. Singer-Friden Corp.,* 529 F.2d 321 (CA10, 1976); *Cromaglass Corp. v. Ferm,* 500 F.2d 601, 604 n. 1 (CA3, 1974) (en banc).

court." 28 U.S.C. § 1291. Since the partial summary judgment against Milgo's counterclaims does not end the litigation, it can be a "final decision" only by virtue of the collateral order doctrine. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Abney v. U.S.*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977); *Litton Systems, Inc. v. Southwestern Bell Telephone Co.*, 539 F.2d 418 (CA 5, 1976); *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (CA5, 1977). The statutory basis for this doctrine is that a trial court's disposition that is not a final judgment may nevertheless be a final "decision" if it adjudicates an "important right" collateral to the cause of action asserted that would otherwise be "lost, probably irreparably" if review had to await a final judgment. *Abney, supra*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d at 659, *quoting Cohen, supra*, 337 U.S. at 546, 69 S.Ct. at 1225, 93 L.Ed. at 1536. We have granted review under the collateral order doctrine when we have found either that the order concerned an issue wholly separable from the remainder of the case or that irreparable injury will result. *See 21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement System*, 404 F.2d 31, 33 (CA5, 1968). In this case we find that the summary judgment neither concerns a wholly separable issue nor threatens irreparable injury.

To preserve even attenuated notions of finality, the collateral order doctrine requires a final disposition

of the question by the district court, not a disposition that is "tentative, informal or incomplete." *Cohen, supra*, 337 U.S. at 546, 69 S.Ct. at 1225, 93 L.Ed. at 1536; *see Abney, supra*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d at 659; *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1095 (CA5, 1977); 15 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3911, at 470, 478-79 (1976). The order appealed from here is not tentative. In view of the court's outright dismissal of the claims, any argument of tentativeness loses its force.[7]

The dismissal of the counterclaim on an implied repeal ground, although final, hardly constitutes an order "completely collateral to the cause of action asserted." *Abney, supra*, 431 U.S. at 658, 97 S.Ct. at 2040, 52 L.Ed.2d at 659. The district court's decision that certain counterclaims must fail by virtue of FCC regulation in a particular area is a decision sustaining

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[7]The district court's order reads in pertinent part:

> "The Court now has read the [FCC's] First Report and Order in Docket # 19528 (released November 7, 1975). It appears that the Commission therein established a registration program for customer-provided equipment. Allegations of registration in accordance with that Order are absent from Milgo's filings. Thus, *at this time*, it appears to the Court that those paragraphs of Milgo's counterclaim which allege unfair competition and antitrust claims based upon the tariff are not properly before this Court."

App. at 161 (emphasis added). The court's language "at this time" indicates not tentativeness, but rather that the court had changed its view after having been apprised of the exact nature of the registration program. Of course, under Federal Rule of Civil Procedure 54(b) the order "is subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all the parties."

a substantive defense to the cause of action asserted; it is a "step toward the final disposition of the merits of the case." *Id., quoting Cohen, supra,* 337 U.S. at 546, 69 S.Ct. at 1225, 93 L.Ed. at 1536. Indeed, if the DAA counterclaims were all this case were about, the order would represent the end of the case. Litigation continues only because a claim (patent infringement) and other counterclaims (discriminatory royalty) remain to be adjudicated.[8]

Nor can Milgo point to any right that would be "lost, probably irreparably," from waiting to appeal the DAA matters after decisions on its other counterclaims and on Western's infringement claim. The only injury Milgo may undergo here is that it may have to return to the district court to try those claims based on the DAA device. This is not enough. In sum, the order dismissing certain of Milgo's counterclaims is neither collateral nor irreparably injurious.

(B.) Interlocutory order refusing an injunction

Milgo claims alternatively that the district court's dismissal of those parts of its counterclaims that challenged the DAA interconnection requirement was a refusal of Milgo's request for injunctive relief and is

[8]Milgo based much of its argument on *Litton Systems, Inc. v. Southwestern Bell Telephone Co.,* 539 F.2d 418 (CA5, 1976), in which the court regarded as a collateral order a stay of an antitrust suit pending referral of an antitrust claim to state utility commissions so that they could clarify the degree of state action involved by virtue of their ratemaking. The court said that the stay pertained not to the merits of the claim but rather to the manner in which the case would be tried. 539 F.2d at 426. In this case, however, the court's order is not a stay pending referral but an outright dismissal.

therefore appealable under § 1292(a)(1).[9] We need not decide whether the order refused injunctive relief because the prayer for injunctive relief is now moot.

During the pendency of this appeal the FCC's registration program went into effect. All the parties recognize that this program prevents Bell from categorically requiring the use of DAAs with modems not of Western's design. Accordingly, there is no longer any need for injunctive relief against the DAA requirement, and the justification for appellate review under § 1292(a)(1) no longer exists.

By complaining against Bell's DAA policy, Milgo sought both injunctive relief and damages. The district court's order effectively refused not only injunctive relief but also an award for damages, which is not moot. Appellate review under § 1292(a)(1) is ordinarily confined to the injunctive aspects of the district court's order, *Abercrombie & Fitch Co. v. Hunting World, Inc.,* 461 F.2d 1040 (CA2, 1972); *Zwack v. Kraus Brothers & Co.,* 237 F.2d 255 (CA2, 1956); *Wrist-Rocket Manufacturing Co. v. Saunders Archery Co., Inc.,* 516 F.2d 846 (CA8), *cert. denied,* 423 U.S. 870, 96 S.Ct. 134, 46 L.Ed.2d 100 (1975); *see* C. Wright, Law of Federal Courts 513 (3d ed. 1976), but such confinement is a rule of judicial administration, not of jurisdiction. An appellate court has power to review the case to the extent it chooses

[9]"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;" 28 U.S.C. § 1292(a)(1).

to exercise it. *See Aerojet-General Corp. v. American Arbitration Association*, 478 F.2d 248, 252-53 (CA9, 1973); *Hurwitz v. Directors Guild of America, Inc.*, 364 F.2d 67, 69-70 (CA2, 1966). *See also Smith v. Vulcan Iron Works*, 165 U.S. 518, 524-25, 17 S.Ct. 407, 410, 41 L.Ed. 810, 812-13 (1897). Moore's Federal Practice ¶ 110.25[1], at 273. In this case where the injunctive aspects are moot and the justification for review under § 1292(a)(1) is no longer present, we doubt that we have the power to reach the remaining noninjunctive aspects of the district court's order, and, if we do, we decline to exercise it.

(C.) All Writs Act

The parties have also urged, somewhat tardily, that we should resort to the extraordinary writ of certiorari to allow interlocutory review. *See* All Writs Act, 28 U.S.C. § 1651. Such writs should be used to allow interlocutory review only in very limited and unusual circumstances. We believe that review by certiorari is not appropriate for this case.

The appeal is DISMISSED.

APPENDIX C.

In the United States Court of Appeals for the Fifth Circuit.

Western Electric Company, Inc., Plaintiff-Appellee, versus Milgo Electronic Corporation and International Communication Corporation, Defendants Third-Party Plaintiffs-Appellants, versus American Telephone and Telegraph Company, Third-Party Defendant. No. 76-4079.

Appeal from the United States District Court for the Southern District of Florida.

Before Clark, Gee and Fay, Circuit Judges.

BY THE COURT: IT IS ORDERED that appellee's motion to dismiss the appeal is DENIED.

APPENDIX D.

United States District Court, Southern District of Florida.

Western Electric Company, Inc., Plaintiff v. Milgo Electronic Corporation and International Communications Corporation, Defendants and Third-Party Plaintiffs v. American Telephone and Telegraph Company, Third-Party Defendant. Case No. 74-1601-Civ-CA.

Order Granting in Part and Denying in Part Motion for Summary Judgment.

THIS CAUSE is before the Court on motion of plaintiff Western Electric Company, Incorporated (hereinafter "Western") for summary judgment against defendants Milgo Electronic Corp. and International Communications Corporation (hereinafter "Milgo").

As grounds for its motion, Western asserts that Milgo has no standing to enforce the consent decree entered in the Government action against Western and has no standing to assert a claim for discriminatory royalties because Milgo has not applied for, and does not want, a license and therefore has not been damaged by the alleged discrimination.

Western strenuously argues that Milgo cannot show either actual or potential damages to itself resulting from Western's allegedly discriminatory licensing practices because Milgo is neither an applicant for a license nor a licensee of Western's patents. It is academic that injury in fact is a requirement for standing under the antitrust laws.

Plaintiff cites *GAF Corp. v. Circle Floor Co., Inc.*, 463 F. 2d 752 (2d Cir. 1972) where the Court held

that the facts alleged by plaintiff were not sufficient to state a claim for relief for damages to GAF's business by reason of a restraint of trade; that treble damages are available only to those who have suffered some dimunition of their ability to compete. Thus, this Court must look to the allegations found in the counterclaim against Western to determine whether Milgo has alleged competitive injury. In so doing, the Court must keep in mind the teaching of the Supreme Court *Hospital Building Co. v. Trustees of Rex Hospital,* #74-1452 (S. Ct. 5/24/76); and the Fifth Circuit, *Miller v. Grandados,* 529 F. 2d 393 (5th Cir. 1976), that complaints alleging antitrust violations are to be liberally construed. The inquiry, then, is whether Milgo's competitive business position was harmed by the anticompetitive effects of the alleged restraint of trade. *Perkins v. Standard Oil Co.,* 395 U.S. 642 (1969).

Milgo is a competitor of Western in the manufacture of telephone equipment. The market in which they compete is loosely defined as those who purchase and/or lease telephone equipment. Milgo has alleged that because of practices engaged in by Western; i.e., use of discriminatory royalty rates monopolization and attempted monopolization, and tieing the use of a DAA to all non-Western manufactured equipment, Milgo has suffered in that the class of telephone equipment purchasers/lessees are forced to pay more if they purchase/lease from Milgo and therefore purchase/lease from Western. These allegations, specifically stated in the counterclaim, allege competitive injury sufficient to confer standing.

Milgo's counterclaims were skillfully drafted in that there are very few references to violation of the consent

decree per se. Examination of the complained of sections shows that only paragraphs A-29(d) and (e) allege violations of the consent decree. Those paragraphs should be stricken. The remaining paragraphs, although alleging acts that may fall within the prohibitions of the consent decree, are couched in antitrust and unfair competition language and suffer no infirmity such that would cause this Court to strike them.

Western further attacks Milgo's assertion of paragraphs which constitute a challenge to tariffs filed with the FCC. In this Court's March 17, 1976 Order, there was a ruling that the issue of whether or not the tariffs which allowed plaintiff to require the use of a data access arrangement when non-Western manufactured equipment was used was a matter peculiarly suited for reference to the Federal Communications Commission (hereinafter "FCC"). At that point the Court did not have the benefit of the FCC Order entered in Docket #19528 before it.

The Court has now read the First Report and Order in Docket #19528 (released November 7, 1975). It appears that the Commission therein established a registration program for customer-provided equipment. Allegations of registration in accordance with that Order are absent from Milgo's filings. Thus, at this time, it appears to the Court that those paragraphs of Milgo's counterclaim which allege unfair competition and antitrust claims based upon the tariff are not properly before this Court.

The issue of claims based upon the alleged violations of the consent decree present a different problem. It is clear that this Court may entertain the alleged consent decree violations as a defense to the infringement action.

American Securit Company v. Shatterproof Glass Corporation (D.C. Del. 1957, 1958), 154 F. Supp. 890 and 166 F. Supp. 813, affirmed, 268 F. 2d 769 (3d Cir. 1959), cert. den. 361 U.S. 902, reh. den., 361 U.S. 973; *American Securit Company v. Hamilton Glass Company,* 258 F. 2d 889 (7th Cir. 1954). However, the violations, if any, of the consent decree do not give rise to an independent cause of action under the antitrust laws. *Paul M. Harrod Co. v. A. B. Dick Co.,* 194 F. Supp. 502 (N.D. Ohio 1961). The cases cited to the Court by Western show that the use of consent decree violations by defendants is limited to that of a shield and may not be extended as a sword.

Western also claims that the challenged practices are proper and refers to Paragraph X(C) of the consent decree to show that the practices are specifically authorized. It does not appear to the Court that there are no material facts in issue as to whether or not the challenged practices are proper and thus summary judgment would be improper at this time. Examination of the allegations shows that Milgo's claims are based on its assertion that Western and AT&T are related and therefore, while there is no requirement that the Bell Operating Companies pay royalties to Western, when the operating companies lease modems to subscribers without charging a royalty; it is the same as Western leasing the modems without charging a royalty. The underlying facts are heavily contested and preclude entry of summary judgment. Western further argues that research and development costs are passed on to operating company subscribers for whom a royalty is not separately stated and that these licensees suffer no economic disadvantage because, by buying the tech-

nology from Western, they have avoided incurring the expenses which the royalty is intended to recoup. Based on that statement, Western claims that Milgo's fundamental proposition is fallacious. However, it does not appear to be so clear cut to this Court. Milgo's argument in opposition is that if the research and development costs are billed to all subscribers, and if those subscribers who use non-Western manufactured modems pay equally with those who use Western manufactured modems and also pay the additional royalty, then the cost to non-Western manufactured modem users is higher and as a result Western's practices cause modem users to purchase from Western rather than Milgo.

In view of the foregoing, it is clear that most of the essential facts are in dispute and that granting of summary judgment would be improper.

It is ORDERED and ADJUDGED that Western's motion for summary judgment is denied, except as to paragraphs A-29(d) and (e) of the counterclaim and those paragraphs alleging unfair competition and antitrust claims based upon tariff #163. Accordingly, those paragraphs are hereby ordered stricken.

ENTERED at Miami, Florida, this 18th day of September, 1976.

/s/ Clyde Atkins
United States District Judge

cc: William E. Sadowski, Esq.
Michael J. Cappucio, Esq.
Albert E. Fey, Esq.
Stanley R. Jones, Esq.
John K. Aurell, Esq.
Dewey, Ballantine, Bushby, Palmer & Wood

APPENDIX E.

Federal Communications Commission
Washington, D.C. 20554
December 16, 1971

American Telephone and Telegraph Company
195 Broadway
New York, New York 10007
Attention: Mr. Thomas W. Scandlyn
Assistant Vice President

Gentlemen:

In its "foreign attachment" decisions of December 24, 1968 and August 13, 1969, the Commission permitted certain tariff revisions filed by AT&T, in response to our 1968 *Carterfone* decision, to go into effect subject to further action by the Commission. 15 F.C.C. 2d 605, 18 F.C.C. 2d 871.

One of the principal features of these revised tariffs was to provide that any customer-provided terminals device directly connected to the switched telephone network must be connected through (1) a "connecting arrangement" that would be "furnished, installed and maintained" only by the telephone company, and (2) a "network control signaling unit" that would likewise be "furnished, installed and maintained" only by the telephone company.

The Commission neither approved nor disapproved these revisions. It decided that, in lieu of further formal proceedings on questions as to the lawfulness thereof, it would be better for the Chief of the Common Carrier Bureau to conduct informal conferences for the purposes of identifying, examining and, subject to Commission review, resolving any questions presented by these re-

visions. The Commission said that these conferences would be the principal forum to assist it in ascertaining what further changes in the tariffs are necessary, desirable and technically feasible. The Commission further stated that it would "be prepared to take such further action as it deems necessary or desirable to resolve outstanding issues."

As a result of a series of conferences we have had with representatives of your company and representatives of other manufacturers and distributors of customer-provided terminal devices, one issue has now crystallized to the point that substantial doubt exists as to whether the revised tariffs are reasonable, nondiscriminatory and in compliance with the *Carterfone* decision insofar as certain practices thereunder are being followed by the company.

The practices in question relate to those terminal devices that are now being manufactured (or have been manufactured in the recent past) by independent manufacturers according to specifications of the telephone company and are now being furnished or offered (or have been offered or furnished in the recent past) by the telephone company to the public for direct connection to the switched telephone network under the trade mark, brand name or symbol of the independent manufacturer. Examples of these are the "Magicall" and "Code-A-Phone" devices.

The question of the lawfulness of the practice arises from the following facts. When such devices are furnished by the telephone company for direct connection, the customer is not required to obtain from the telephone company any additional or separate "connecting arrangement" or "network control signaling unit." These

features are generally incorporated into the device itself. However, if the same device is obtained by a customer from the same manufacturer for direct connection to the network, the current practice of the telephone company, under the present tariffs, is to refuse to provide service or to discontinue or threaten to discontinue the service of that customer if he uses that same device without obtaining a separate telephone company-provided connecting arrangement and network control signaling unit. This practice involves the imposition of extra charges and conditions upon customers who obtain these same devices from non-telephone company sources. Thus, the practice would appear to place independent suppliers of such devices at a competitive disadvantage in their efforts to market such devices directly to the public.

In connection with the foregoing we have examined the telephone company sales brochures for the "Magicall" and "Code-A-Phone." These brochures extol the qualities of these devices as though they were Bell System devices. Thus, for example, the Bell Systems brochure on the "Code-A-Phone" describes that device as "rugged," "dependable" and as "Bell System equipment." Moreover, according to these brochures, both the "Magicall" and the "Code-A-Phone" are provided to the customer with the manufacturers' registered trade mark on brand names thereon as well as the Bell System's symbol.

The apparent competitive disadvantage referred to above appears to be aggravated by the fact that certain competitive devices of other manufacturers are, contrary to the tariff requirement, being "hardwired" by non-telephone company installers to the switched telephone network without going through such additional tele-

phone company-provided facilities. We understand from the telephone company that it endeavors to enforce its tariffs where it learns of the existence of these cases, but that it has no way of assuring that there is general compliance with the tariffs. Under these circumstances it would appear that the independent manufacturers, who provide brand name devices to the telephone company and to the public according to specifications set by the telephone company are being prevented from effectively competing with either the telephone company, who markets the same device, or other manufacturers who are marketing competitive products.

When the Commission permitted the revised tariffs to go into effect on January 1, 1969, it was unaware of the existence of this apparent type of discrimination. However, as heretofore stated, one of the purposes of our informal conferences has been to identify and uncover problems such as this, and to take such steps as may be necessary to resolve them.

In view of all of the foregoing, we believe that the telephone company should promptly terminate its practice of refusing service or of discontinuing, or threatening to discontinue, the service of customers who obtain devices in the categories referred to above (e. g. the "Magicall" and "Code-A-Phone") and, further, that it should make such revisions in its tariffs as may be necessary to reflect such change in practice. This does not mean that the telephone company should not perform the actual "hard-wire" connection in accordance with the provisions of its tariffs applicable to the installation of the same device provided by the telephone company. Nor does it mean that the

company could not discontinue service to protect against actual harm as provided in other portions of the tariffs. It would mean that the company could not require separate connecting arrangements and network control units over and above those incorporated into devices which are built according to the telephone company specifications, and provided to customers under the brand name or symbol of the independent manufacturers. Under these conditions, customers obtaining such a device from the telephone company would be treated the same as one obtaining the same device from an independent manufacturer. This, in turn, would remove the competitive disadvantage to the independent manufacturer which would appear to result from your present practice.

We assume that you will take no steps to discontinue or threaten discontinuance of any existing service pending any necessary revisions in your tariffs.

In addition to the foregoing, and pending the development of appropriate standards to apply to all such devices, certain additional measures appear to warrant immediate consideration, particularly to avoid giving an unfair competitive advantage to the telephone company and the independent manufacturers who sell their brand name devices to the telephone company and to the public. First, the telephone company should permit other suppliers of terminal devices that are competitive with such brand name devices, to obtain direct connections by the telephone company of their devices on the same terms and conditions that apply in the case of such brand name devices. Second, the telephone company should publish and make available to all interested parties, and the Commission, the specifi-

cations which the telephone company has adopted for the manufacture of the aforementioned brand name devices insofar as such specifications are related to the prevention of harm to the switched telephone network from (i) improper signaling or (ii) line imbalance or (iii) excessive voltages. Third, the telephone company should continuously monitor each installation it makes under the foregoing revised practices and keep written records as to the occurrences, types and frequency of the harm allegedly caused by such devices and the disposition made thereof and should submit monthly reports thereon to the Commission.

These measures will enable other manufacturers and distributors, pending the development of more universal standards, to be treated the same as the telephone company and its brand name manufacturers in the direct connection of all such competitive devices. They will also assist in the gathering of empirical data relative to the nature and extent of "harm" to the network that such types of interconnection may occasion.

Your response within 10 days from the date of this letter will be appreciated.

Sincerely yours,

/s/ Bernard Strassburg
Bernard Strassburg
Chief, Common Carrier Bureau

cc: NARUC
USITA
General Telephone
United Telephone
Continental Telephone

APPENDIX F.

United States District Court for the District of Columbia.

United States of America, Plaintiff, v. American Telephone and Telegraph Company, Western Electric Company, Inc. and Bell Telephone Laboratories, Inc., Defendants. Civil Action No. 74-1698.

Memorandum of Federal Communications Commission as Amicus Curiae.

* * *

[Pages 19 and 20]

5. *Tariff Regulation.*

Carriers subject to FCC jurisdiction are required to file tariffs settting forth the rates, practices and regulations that govern their service offerings. 47 U.S.C. §203. These must be just and reasonable, 47 U.S.C. §201, and they must not contain undue discriminations or preferences, 47 U.S.C. §202. The Commission's authority for policing these requirements is specifically set forth in Sections 204 and 205 of the Act, 47 U.S.C. §§204, 205, which balance the interests of consumer and corporate investor. On the one hand, the consumer is entitled to service at rates that are just and reasonable; on the other, the carriers are entitled to a reasonable return so that the "vast sums necessary for the maintenance and expansion of their systems through equity and debt financing" will be available. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division,* 358 U.S. 103, 113 (1958). As the Court said in the *United Gas* case, the consuming public has a vital stake in the financial stability of public utilities. *Id.*

The Communications Act, like other federal regulatory statutes, contemplates that the carrier in most

instances will initiate rate changes by filing new tariffs, and that those tariffs generally will go into effect without agency approval. *AT&T v. FCC*, 487 F.2d 865, 871-72 (2d Cir. 1973). *Cf. United States v. Southern Ry.*, 372 U.S. 658 (1963). The Commission may suspend tariff changes up to 90 days and initiate investigations to determine lawfulness. After full hearing, it may declare the tariffs unlawful and either require changes or prescribe changes of its own making. In addition, it may require refund of unlawful rates after hearing.[22] 47 U.S.C. §§ 204, 205. But rate filings generally proceed from the carrier's independent business judgment, and the Communications Act does not require Commission approval either before or after the rates become effective. It follows, then, that rates and other tariff provisions may and often do become effective without Commission scrutiny or approval.[23]

These carrier-initiated tariffs which have not been approved by the Commission do not in our opinion immunize the carrier against claims that the tariffs are anticompetitive. The courts have consistently exercised jurisdiction in antitrust cases attacking carrier practices and rates that purportedly were justified by tariffs on file with but not approved by the Commission.

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[22]The refund remedy, of course, can provide no relief to a competitor who alleges that the rates are so low as to be predatory. The Act simply contains no provisions for redressing such a wrong, even if the Commission after hearing finds that the allegations are true. See *Nader v. FCC*, Nos. 73-1045, 73-2051, D.C. Circuit, decided Sept. 29, 1975, slip opinion, pp. 1930, 1940.

[23]In a recent 12-month period (September 1974 through August 1975), the Commission received 1,371 tariff filings totaling 11,491 pages. This does not count the voluminous supporting papers filed with the tariffs. The Commission obviously could investigate only a small percentage of these filings.

See, *e.g.*, *Macom Products Corp. v. AT&T*, *supra*; *Chastain v. AT&T*, *supra*; *Carter v. FCC*, *supra*. As in the interconnection area, accommodation of antitrust policy to FCC regulation of tariff matters has been effected by referral under the doctrine of primary jurisdiction. *Id.*

The sole exception to this rule of concurrent jurisdiction arises when the Commission has prescribed or specifically approved a tariff.[24] Congress has entrusted the Commission with sole authority to prescribe and approve rates, practices, procedures and regulations set forth in tariffs. Even a court with . . .

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[24]The difference between carrier-made and prescribed rates has been recognized in another context. See *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932), where the Court held that reparations could not be ordered if the carrier had charged rates prescribed by the Interstate Commerce Commission. See also *Public Utilities Commission of California v. FCC*, 356 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 816 (1966). This principle remains valid. See *Nader v. FCC*, *supra*, slip opinion, p. 1936.